

1960. Present : Basnayake, C.J., and Sansoni, J.

S. K. MOONESINGHE, Appellant, and THE AUDITOR-GENERAL
and others, Respondents

S. C.24/59—Urban Councils Ordinance No. L—1/29/28

Urban Council—Audit—Recovery of surcharges—Expenses incurred by a member on his own responsibility in defending an action—Reimbursement by Council from the Local fund—Liability of Chairman to be surcharged—Urban Councils Ordinance No. 61 of 1939, ss. 34, 194, 195, 232.

In D. C. Panadura Case No. 2449 a clerk employed in the Urban Council sued the Chairman of the Council for damages for wrongful dismissal, but his action was dismissed with the consent of the parties because the plaintiff, having been given permanent employment by the Local Government Service Commission, did not wish to proceed with the action. The defendant was not condemned in costs. Thereafter, the defendant, who was still a member of the Council, though not its Chairman, was paid by the new Chairman, with the unanimous approval of the Council, the sum of Rs. 1,586 from the local fund on account of expenses incurred by him on his own responsibility in connection with the legal proceedings, in which no plea of immunity under section 232 (1) of the Urban Councils Ordinance had been taken by the defendant.

Held, that the Auditor-General was entitled, under section 194 (1) of the Urban Councils Ordinance, to disallow the sum paid to the defendant in respect of D. C. Panadura Case No. 2449 and to surcharge the full sum on the new Chairman alone. The payment could not be justified by the provisions of section 232 of the Urban Councils Ordinance.

A PPEAL under section 195 of the Urban Councils Ordinance No. 61 of 1939 by the Chairman of the Urban Council of Panadura against a surcharge made on him by the Auditor-General under section 194 of that Ordinance.

E. R. S. R. Coomaraswamy, with *Nimal Senanayake*, for Appellant.

V. Tennakoon, Deputy Solicitor-General, with *E. R. de Fonseka*, Crown Counsel, for 1st and 2nd Respondents.

M. M. Kumarakulasingham, for 3rd and 4th Respondents.

September 20, 1960. BASNAYAKE, C.J.—

This is an appeal under section 195 of the Urban Councils Ordinance No. 61 of 1939 by Somasiri Kumaradasa Moonesinghe, the Chairman of the Urban Council of Panadura, against a surcharge of Rs. 1,586/- made on him by the Auditor-General under section 194 of that Ordinance. The certificate of the Auditor-General under section 194 reads as follows :

“ I, Lionel Augustus Weerasinghe, Auditor of the accounts of Urban Councils, do hereby, under section 194 (1) of the Urban Councils Ordinance No. 61 of 1939, disallow and surcharge against S. K. Moonesinghe,

Chairman, Urban Council, Panadura, the sum of Rs. 1,586/- (Rupees One thousand five hundred and eighty six only) paid by him from the funds of the Urban Council, Panadura, on voucher No. 139 of 22.6.57 to Mr Noel T. Mendis on account of expenses incurred by him in respect of D. C. Panadura Case No. 2449 as I consider this an item of account contrary to law, and I do hereby certify that the sum of Rs. 1,586/- (Rupees One thousand five hundred and eighty six only) is due from the said Mr S. K. Moonesinghe to the said Urban Council.

Sgd. A. WEERASINGHE
Auditor
Urban Councils.

Audit Office
Colombo 7, 29th November 1958."

Shortly the facts are as follows :—On 22nd January 1951 one Habaragomuralalage Marshall Peiris Goonetilleke of Panadura sued Noel T. Mendis, who was the Chairman of the Urban Council of Panadura between 17th January 1950 and 9th October 1952, for damages in a sum of Rs. 2,000/-. The plaintiff alleged that the defendant had wrongfully and unlawfully and acting maliciously in the pretended exercise of his authority discontinued him from the services of the Urban Council in which he was employed as a clerk. The defendant filed answer on the 13th April 1951 and stated that the action taken by him was in his capacity as Chairman of the Urban Council of Panadura, and he denied that any cause of action had accrued to the plaintiff to sue him in his personal capacity. The case was thereafter fixed for trial on 17th July 1951. As the defendant was unable to get ready for trial on that day it was postponed to 22nd October 1951. On 16th October 1951 the defendant again moved for a postponement on the ground of the illness of his counsel and the trial was refixed for 29th February 1952. On 25th February 1952 on the application of the defendant the trial was again postponed on the ground of illness of his Proctor to 9th July 1952. On that day too the trial was postponed, 25th November 1952 being the next date. Between 9th July 1952 and 25th November 1952, to be exact on 9th October 1952, the defendant ceased to be the Chairman. On 25th November it was brought to the notice of the Court that a settlement was in progress and the trial was for the fifth time postponed to 1st April 1953. The trial was thereafter postponed to 8th September 1953 and on that date to 8th December of the same year and again to 10th September 1954. On that date issues were framed and after a preliminary discussion of the points of law involved in them time was given to counsel for the plaintiff to consider whether he should move for an amendment of the plaint. Thereafter on 13th October 1954 an application for an amendment of the plaint was made. The defendant opposed the application and the matter came up for hearing on 2nd December 1954. The application to amend was refused but the plaintiff was permitted to alter the date 31st March 1950 in paragraph 5 of his plaint to 9th May

1950 on his paying the defendant before 22nd February 1955 the taxed costs incurred by him unless they agree as to the amount of costs. If the plaintiff was unwilling to do so the trial was to proceed. The plaintiff was asked to pay to the defendant the costs of the inquiry. The trial was thereafter fixed for 10th and 11th October 1955. On the first named of those dates the plaintiff's counsel stated "Plaintiff having been given permanent employment by the Local Government Service he does not wish to pursue with this action." The minute of that date proceeds—

"At this stage it is agreed Decree should be entered dismissing plaintiff's action with costs but if plaintiff pays Rs. 100/- to Deaf and Blind School Ratmalana before 10/12/55, then satisfaction of decree re costs to be entered."

On 8th December 1955 the minute of the journal has recorded the fact that Rs. 100/- was paid to the Deaf and Blind School, and the plaintiff's Proctor moved that it be certified of record and that satisfaction of decree be entered.

Thereafter on 7th September 1956 the defendant who was still a member of the Urban Council, though not its Chairman, addressed a letter to the Chairman and other members of the Council in which he asked the Council in terms of section 232 of the Urban Councils Ordinance to pay him a sum of Rs. 1,754/50 as expenses incurred by him in defending the action against him, but the request was not supported by receipts for the payments made by him. He said :

"I was put to considerable expense in retaining lawyers and in summoning witnesses in order to establish my defence. May I therefore ask the Urban Council of Panadura to defray all expenses which I had to incur in order to defend myself in this action."

After quoting section 232 of the Urban Councils Ordinance he concluded his letter thus :

"In terms of this section may I ask the Council to pay me my expenses amounting to Rs. 1754/50 after any resolution to that effect has been sanctioned by the Auditor-General."

The application came up before the Council on 10th September 1956. The following record appears in the minutes in regard to it :—

1956 සැප්තැම්බර් මස 10. සම්මුති අංක 233.

නගර සභාවෙන් අස් කරන ලද තාවකාලික ලිපිකරුවෙක් විසින් තමා සභාපති ව සිටි කාලයේ තමාට විරුද්ධ ව පවරන ලද නඩුවක් නිසා තමා අතින් වියදම් වුණු රුපියල් 1,754.50 තමාට ලැබෙන්නට සලස්වන මෙන් සඳහන් කරමින් අංක 4 කොටසේ නියෝජිත නොයෙල් ටී. මැන්දිස් මහතා විසින් එවන ලද 7.9.56 දින දරණ ලිපිය ගැන සලකා බැලිණි.

නොයෙල් වී. මැන්දිස් මහතා කරා කරමින් තමා අතින් වියදම් වුණු මේ මුදල් අයකර ගැනීමට ඉඩ ඇති හෙයින් ඒ මුදල නගර සභාව මගින් ගෙවිය යුතු යයි යෝජනා කරන බව පැවසී.

ආතර් විජේවර්ධන මහතාගේ ස්ථීරත්වයෙන් යෝජනාව සභා සම්මත වූයෙන් එම මුදල ගෙවිය හැකි දැයි ප්‍රධාන ගණකාධිකාරී මහතාගෙන් අසා දැන ගැනීමට තීරණය වී.

Acting on that resolution on 29th September 1956 the then Chairman of the Urban Council forwarded to the Auditor-General a copy of the resolution and a copy of Mr Mendis's letter, and in his covering letter added certain information regarding the dates on which the case came up for trial, which Mr Mendis had furnished. The Auditor-General by letter dated 9th October 1956 informed the Chairman that it was not consistent with his duties as Auditor of the accounts of the Urban Council to tender any advice in regard to the proposed payment and that the Chairman should consult the Commissioner of Local Government in the matter. Whether the Commissioner of Local Government was consulted and, if he was, whether he gave any advice, does not appear from the papers before us, but the matter appears to have been brought up on 10th June and the following resolution passed by the Council :—

1957 ජූනි 10, සම්මුති අංක 23

සභාපති ඇස්. කේ. මුණසිංහ මහතා කරා කරමින් නොයෙල් වී. මැන්දිස් මහතා සභාපතිව සිටි කාලයේ දී සේවයෙන් අස් කරන ලද සේවකයකු විසින් දැමූ නඩුවක දී නමාගෙන් වියදම් වූ රු. 1,754.50 ලැබෙන්නට සලස් වන මෙන් ඉල්ලා සිටිමින් ඉදිරිපත් කර ඇති 1956 සැප්තැම්බර් 20 වැනි දින සම්මුති අංක 23 දරණ යෝජනාව අනුව ඒ පිළිබඳ ව ක්‍රියා කරගෙන ගොස් මේ මුදල ගෙවීම පිළිබඳ ව ලින් ප්‍රනාන්දු මහතාගේ උපදෙස් ලබා ගැනීමට අදහස් කළ නමා ඒ සඳහා උපදෙස් ඉල්ලා සිටි අවස්ථාවේ දී නිත්‍යානුකූල ව එවැනි ගෙවීමක් නගර සභාවෙන් ගෙවීමට හැකි දැයි යන්න තමාට තීරණය කළ නොහැකි නමුත් එම මුදල ගෙවීම හෝ නොගෙවීම නගර සභාවේ යුතුකමක් යයි ඒ මහතා පැවසූ නමුත්, එම උපදෙස් අනුව කල්පනා කර බැලීමේ දී මෙම මුදල ගෙවීම සුදුසුයයි තමා අදහස් කරන බවත්, එහෙත් එම මුදල ගෙවීමේ දී 1950-51 යන වර්ෂයන්හිදී මේ නඩුව සම්බන්ධයෙන් යම්කිසි මුදලක් නගර සභාවෙන් වියදම් වූනිනම් ඒ මුදල අඩුකර ඉතිරි මුදල ගෙවීම කළ හැකි බවත් සභාපති මහතා පැවසීය.

පසු ව සභාව මේ පිළිබඳ ව සලකා බලා 1950-51 යන වර්ෂයන්හි දී මේ නඩුව සම්බන්ධයෙන් සභාවෙන් යම්කිසි මුදලක් වියදම් කරන්නට සිදු වූනිනම් එම මුදල රු. 1,754.50න් අඩුකර ඉතිරි මුදල ගෙවීමට ඒකමතික ව තීරණය කරගන්නා ලදී.

Thereafter on 26th June 1957 Mr Mendis made a further claim for his expenses by letter of that date to the Chairman of the Urban Council. In that letter he said :

“Further to my letter dated 7th September 1956 claiming Rs. 1,754.50 being a portion of expenses incurred by me in connection with the above case it is clear from the annexed certified copy of the Journal Entries that there have been 14 trial dates spread between the

years 1951 and 1955. Quite apart from the stamp fees, batta to several witnesses and other incidental expenses incurred by me, Counsel's fees alone on the basis of 15 guineas for each trial date amounted to approximately Rs. 2,275/-. If, however, all the other expenses incurred by me are taken into account, it would amount to over Rs. 2,500/- but I am restricting my claim only to a sum of Rs. 1,754.50."

In a postscript he said :

" If the payment to me is not approved by the Audit, I shall make good the amount."

The appellant issued under his hand a voucher dated 22.6.57 for Rs. 1,586/- in favour of Mr Mendis to which he appended the following certificate under the designation of " Officer responsible for the service " :

" I certify that the above account amounting to Rupees One thousand five hundred and eighty six only and cents is correct and was incurred under the authority quoted and that the charge is in accordance with the regulation or contract governing it and is fair and reasonable."

To this voucher was attached Mr Mendis's letter of 26th June 1957 in which he undertook to pay back the money if the Audit did not " approve " the payment. A cheque signed by the appellant appears to have been issued in payment of the voucher on 27th June 1957.

On 6th May 1958 the Auditor-General addressed the following letter to the appellant :—

" I have to address you with reference to the payment of Rs. 1586/- made by you on voucher No. 139 of 22.6.57 to Mr Noel T. Mendis as reimbursement of legal expenses of Rs. 1754.50 less Rs. 168.50 drawn earlier, in Case No. 2449 in the District Court of Panadura. The case referred to was an action for damages in a sum of Rs. 2000/- claimed from Mr Mendis personally by Mr H. M. P. Gunatilleke for having been wrongly discontinued from the service of the Urban Council, Panadura.

2. The payment is, in my view, contrary to law in that (i) Mr Mendis had not reported the matter to the Council and obtained its prior approval in terms of Section 48 (i) of the Urban Councils Ordinance to defend the case and (ii) a claim of Rs. 1754.50 for defending an action for Rs. 2000/- is, *prima facie*, excessive. There is also the point as to whether Mr Mendis, having settled the case amicably consequent on the grant of permanent employment by the Local Government Service Commission to Mr H. M. P. Gunatilleke, and having waived his costs, which the Court was prepared to allow, is entitled to make a claim on the Council.

3. I, therefore, propose to disallow in terms of Section 194 (i) of the Urban Councils Ordinance, No. 61 of 1939, the aforesaid sum of Rs. 1586/- (Rupees One Thousand five hundred and eighty six) and surcharge the same on you as the person who authorised the payment and I do hereby, as required by Section 194 (2) of the same Ordinance, give you notice that you may make any representations with reference to such proposed disallowance and surcharge as you may think fit. Such representations should be made to me within one month of the date hereof.

I am, Sir,
Your Obedient Servant,
Sgd. A. WEERASINGHE,
Auditor
Urban Councils.”

On receipt of this letter the appellant asked for a certified copy of the letter which contained Mr Mendis's undertaking to refund the money if the payment to him was not passed in audit. Upon receipt of it the appellant wrote to the Auditor-General on 3rd June 1958 as follows :—

“Reference to your letter dated 6th May 1958, the payment of Rs. 1,586/- to Mr Noel T. Mendis on Voucher No. 139 of 22.6.57 as re-imbusement of legal expenses in case No. 2449 in D. C. Panadura was made on a unanimous decision of Council (Res : 23 of 10.6.57). I as Chairman in making payment acted upon the decision of the Council as provided for in Sec. 34 of the Urban Councils Ordinance.

When the question of payment of cost of litigation in the case instituted by Mr H. M. P. Gunatilleke against Mr Noel T. Mendis was brought up in Council on 8.10.56 (vide Res. 2A) it was decided to obtain legal opinion as to the validity of the payment.

In terms of this resolution I wrote to Council's Lawyers, Messrs Fernando & Fernando, Crown Proctors, Panadura, seeking legal opinion on the matter. The Lawyers after having gone through the relevant documents, files, etc. advised the Council that the payment was in order.

The Council at its meeting held on 10.6.57 considered this matter and unanimously resolved to pay this sum to Mr Noel T. Mendis. When the matter was being discussed, it was also agreed to obtain an undertaking from Mr Noel T. Mendis that he would refund this sum if the payment was not approved by the Audit. Mr Noel Mendis accordingly gave the undertaking which was annexed to Voucher No. 139 of 22.6.57 by which the payment was made and therefore Mr Mendis alone is liable for a surcharge in the event of your disapproving the payment.

In view of this undertaking given by Mr Mendis I am of the view that the surcharge should be on Mr Noel T. Mendis as the person who actually drew the amount and not on me.

As stated above, I, as Chairman only acted in terms of proviso to Sec. 34 of the Urban Councils Ordinance.

Your proposal to surcharge the full amount on me, I state, is unfair and unreasonable. If a surcharge is made it should be on Mr Mendis OR on all the members of the Council who voted for the resolution of Council authorising the payment."

In reply to this letter the Auditor-General wrote as follows :—

" I have to refer to your letter No. A of 3rd June 1958 in reply to the notice of surcharge given by my No. L-1/29/28 of 6.5.1958, and to state that I am unable to accept your explanation as good and sufficient reason for passing in audit the payment of the sum of Rs. 1,586/-.

2. I, therefore, enclose a certificate of surcharge under section 194(1) of the Urban Councils Ordinance No. 61 of 1939.

3. In this connection your attention is invited to section 195 of the said Ordinance as amended by Ordinance No. 31 of 1946."

The certificate of surcharge referred to therein is set out at the commencement of this judgment.

Learned counsel for the appellant contended that the surcharge was not warranted by the law under which the Auditor-General purported to act. Learned counsel for the Auditor-General argued that sections 232(1) and 232(2) did not empower the Chairman of the Urban Council to pay out of the local fund the claim made by Mr Mendis. Section 232(1) reads as follows :—

" No matter or thing done and no contract entered into by any Urban Council, and no matter or thing done under the direction of any Urban Council by any member or officer of such Council or by any other person whomsoever, shall, if the matter or thing so done or the contract so entered into was done or entered into *bona fide* for the purpose of this Ordinance or any other Ordinance relating to the powers and duties of an Urban Council, or any by-law, or rule made thereunder, subject any member of the Council or any such officer or other person, in his private capacity, to any action, liability, claim, or demand whatsoever; and any expenses incurred by any such Council, or by any member, officer, or other person acting as aforesaid, shall be borne and repaid out of the local fund.

Provided that nothing in this section shall exempt any member of any Urban Council from liability to be surcharged with the amount of any payment which may be disallowed upon the audit of accounts of such Council, and which such member authorised or joined in authorising."

It is contended on behalf of the Auditor-General that the expenses contemplated under sub-section (1) are not legal expenses incurred by the Council or any of its members but expenses incurred in the doing of any of the acts referred to in the earlier part of the section. With this submission we agree.

For a member to be repaid out of the local fund the expenses incurred by him under subsection (1) a matter or thing must be done or a contract entered into by him under the direction of the Urban Council *bona fide* for the purposes of the Urban Councils Ordinance or any other Ordinance relating to the powers and duties of Urban Councils or any by-law or rule made thereunder. This is not such a case. There is no matter or thing done by Mr Mendis under the direction of the Urban Council for which he has incurred expenses. The defence of the action is not such a matter or thing and the expense incurred in that behalf cannot be borne and repaid out of the local fund.

In our opinion the provision that applies to costs in legal proceedings is section 232 (2) which reads as follows :—

“ Subject and without prejudice to any other powers, an Urban Council in any case where the defendant in any action, prosecution, or other proceeding is a member of the Council, or its officer, agent, or servant, may, if it thinks fit, except so far as the court before which the action, prosecution, or other proceeding, is heard and determined otherwise directs, pay out of the local fund all or any part of any sums payable by the defendant in or in consequence of the action, prosecution or proceeding, whether in respect of costs, charges, expenses, damages, fines, or otherwise.”

In the instant case the member had incurred the expenses on his own responsibility, and section 232 (2) does not empower the Urban Council to reimburse a member who has expended his own money in defending an action. It empowers the Council to pay any costs a member who is a defendant is decreed to pay by a Court. The member was not condemned in costs. Subsection (1) makes a member who does a matter or thing *bona fide* for the purpose of the Ordinance immune from liability to be sued in his private capacity, but the Ordinance does not provide for his conducting his defence at his expense, without pleading his immunity under subsection (1), and later seeking reimbursement of his expenses.

We are of opinion that the Auditor-General has acted within the provisions of the law and that the surcharge has been properly made. Section 194(1) vests in him the discretion of deciding whether he should surcharge the item of account disallowed on the person making the illegal payment or the person authorising it. The payment to Mr Mendis was a payment from the local fund, and the appellant as the person signing the cheque has been rightly surcharged as the person making the payment.

No doubt it is within the auditor's power if he so thinks fit in a given case to surcharge any one or more of the persons who concur in the illegal payment or vote for it.

It was contended by learned counsel for the appellant that the appellant should not have been singled out for the surcharge as the other members also authorised the payment. But in the circumstances of the instant case the Auditor-General has thought it fit to surcharge the person making illegal payment and he was acting *intra vires* in so doing. The appellant should have no cause for complaint as he has played such a prominent part in persuading the Council to make the payment and in himself executing the necessary documents in that behalf.

The appeal is dismissed with costs payable to the 1st respondent.

SANSONI, J.—I. agree.

Appeal dismissed.

