2009:BHC-AS:8999-DB

THE HIGH COURT OF JUDICATURE OF BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2611 OF 2008

Shri Masuood Alam Khan-Pathan,
Adult,
Occ.:- At present Advocate,
Residing at 36, Phule Nagar,
Yerawada, Pune- 411 006. ... Petitioner

V/s

1. State of Maharashtra,
Through the Secretary,
Medical Education and
Drugs Department,
Mantralaya, Mumbai- 32.

2. The Secretary,
Medical Education and
Drugs Department,
Mantralaya, Mumbai- 32.

3. The Commissioner,
ESIS Bhavan,
6th Floor, N.M.Joshi
Marg, Lower Parel,
Mumbai- 400 013. ... Respondents

Mr.S.P.Saxena, Advocate for the Petitioner.

Mr.V.A.Sonpal, AGP for Respondent Nos.1 to 3

CORAM: V. C. DAGA, &
MRS. MRIDULA BHATKAR, JJ.

DATE : 7th May, 2009

JUDGMENT :(Per Mridula Bhatkar, J.)

This Writ Petition is directed against the Order dated dated 27th November 1998 passed by the Maharashtra Administrative Tribunal, Mumbai.

Factual Matrix :

2. The Petitioner was working as the Administrative Officer in the office of the Administrative Medical Officer, E.S.I.S. at Mumbai. At the time of audit of the Hospital account, misappropriation of some amount was revealed and the investigation was carried out. The Petitioner was prosecuted along with some other person for misappropriation of the property and falsification of the account and criminal cases bearing Nos. 111 of 1984 & 112 of 1984 were registered against him. On the other hand, Respondent No. 1 had started departmental proceedings against the Petitioner.

3. The aforesaid enquiry was conducted by a Special Officer for Departmental Enquiries, Nashik and Pune Division, Pune. The said enquiry was concluded holding the Petitioner guilty and accordingly a report was submitted by the Special Enquiry Officer. Pursuant to the said outcome of the enquiry, the Disciplinary Authority under provisions of Rule 27 of the Maharashtra Civil Service (Pension) Rules, 1982 directed that 50%

of the pension payable to the Petitioner be withheld and the said punishment was imposed on the Petitioner. It was further directed that the period which was spent that is the period of suspension from 20th December 1983 to 31st July 1988 be treated as “suspension period” for all the purposes. In order to implement this decision, the Government of Maharashtra passed the Government Resolution dated 14th March 1991 which was challenged by the Petitioner before the Maharashtra Administrative Tribunal (MAT).

4. The MAT, after hearing the parties, confirmed the action of the State Government to the extent it holds Petitioner guilty of misconduct leading to loss of funds and, consequent penalty imposed on him. However, in view of breach of principles of natural justice, it quashed and set aside the order treating the petitioner under suspension during the period of suspension and remanded the matter to the competent authority to take its decision afresh after giving the petitioner an opportunity of hearing.

5. The petitioner, however, has approached this Court against the said order of MAT upholding the penalty including quantum thereof by filing this petition under Article 226 and 227 of the Constitution of India, with a prayer to quash and set aside the order passed by the MAT in Original Application No.1150/1992.

Submissions :

6. Learned counsel for the Petitioner has submitted that the findings given in the departmental proceeding are not correct. The charges leveled against the Petitioner were not serious in nature like corruption but were of mere negligence leading to misconduct, which, in fact, ought not to have been held as proved. The grievance was made that the documents which were asked for by the Petitioner were not furnished to him. It was also submitted that the disciplinary authority ought to have considered the fact that the Petitioner was acquitted in Criminal Case Nos.111/1984 and 112/1985 and no appeal was preferred by the State against the decision of acquittal. It was further submitted that the disciplinary authority did not follow the procedure of the enquiry prescribed under Sub-Rules 18 and 20 of Rule 8 of Maharashtra Civil Service (Discipline and Appeal) Rules of 1979 [the "MCS (D & A) Rules" for short]. Learned Counsel for the Petitioner tried to demonstrate serious prejudice suffered by the Petitioner by not following sub-Rule 20 of Rule 8 of MCSR (D & A) Rules. It was further submitted that the order of the disciplinary authority and subsequent order of the MAT holding the Petitioner guilty of misconduct is liable to be set aside. It was, alternatively, urged that the penalty withholding 50% of the pension amount and

the gratuity should be modified and rigour thereof be reduced looking to disproportionate punishment inflicted on the Petitioner merely because he happened to be a retired officer of the State.

7. While countering the arguments, the learned AGP, made submissions that the Enquiry Officer has followed the requisite procedure under MCSR Rules during a departmental enquiry. It was argued that the delinquent was given an opportunity to defend himself properly, and that there was no question of denial of any opportunity to the delinquent. It was further submitted that in para 7 of the order dated 25th January 1991 passed by the disciplinary authority, it is categorically stated that the opportunity was given to the petitioner to show cause as to why the penalty based on the enquiry report be not imposed. According to him, the principles of natural justice were not violated since the procedure laid down was followed. He tried to urge that non-compliance of Sub-Rule 20 of Rule 8 referred to hereinabove will have no effect on the enquiry, even if it was not followed by the Enquiry Officer.

The Issue :

8. The issue for consideration is whether in the facts and circumstances of the case the MAT was justified in upholding the Departmental Enquiry and the punishment imposed on the

delinquent?

Consideration :

9. Petitioner has challenged the order of the Enquiry Officer which is based on the evidence tendered before him. Administrative Medical officer has served articles of charge along with all annexures on the delinquent officer. The administration has made allegations and framed charge of negligence in performance of the duty thereby causing loss of Rs. 63,097.50/- to the Aundh Hospital, Pune and also loss of Rs. 59,738.36/- caused due to the theft as the Petitioner did not follow the rules and procedure while depositing money and maintaining relevant registers. There were also charges that without correction and verification, the statement of payments was forwarded to the Accounts Branch and that he had unauthorizedly drawn his pay and allowances as duty pay when he was on leave from 16-7-1979 to 21-7-1979 which was not sanctioned.

10. We went through the exhaustive report submitted by the Special Officer for Departmental Enquiries, Nashik and Pune Division, Pune on the charges. In the said report, the Enquiry Officer has concluded in para 38 that except charge No.6 i.e. investigating officer and staff members to make applications, complaints etc., all the other charges from Serial Nos. 1 to 5 have been proved against the Petitioner to the extent discussed in the enquiry report.

11. On the point of procedure, infraction of Sub-Rule 20 was pressed into service, which reads as under:

> "(20) The inquiring authority may, after the Government servant closes his case and shall, if the Government servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Government servant to explain any circumstances appearing in the evidence against him."

12. The above sub-rule indicates that the delinquent officer is entitled as of right to have his attention drawn to any material against him in evidence that may come before quasi judicial authority which is likely to prejudice his case either directly or indirectly. The whole object of the sub-rule is to afford the charged officer a fair and proper opportunity of explaining circumstances which appear against him. In fairness, each and every material adverse circumstances should be put simply and separately so as to enable him to explain the same.

13. The above procedure of putting questions to the Petitioner on the incriminating circumstances was not followed.

14. Having taken note of the undisputed requirement of sub-rule- 20 which requires the

Enquiry Officer to draw attention of the delinquent to the adverse material brought on record by the employer, but at the same time it is also clear that the delinquent is not entitled to have his attention called to any material that may come before the quasi judicial tribunal unless the material in question is prejudicial to his case either directly or indirectly.

15. At this stage, it is also necessary to consider the effect of omission to comply with the requirement of the rule of Audi Alteram Partem which is pregnant in sub-rule 20 supra. As a general rule, the enquiry vitiates for non-compliance of the said sub-rule. Where there is violation of natural justice no resultant or independent prejudice need be shown, as the denial of natural justice is, in itself, sufficient prejudice and it is no answer to say that even with observance of natural justice the same conclusion could have been reached. The citizen is entitled to be under the Rule of law and not the Rule of Discretion and to remit the maintenance of constitutional right to a quasi judicial discretion is to shift the foundations of freedom from the rock to the sand. But the effects and consequences of non-compliance may alter with situational variations and particularities, illustrating a flexible use of discretionary remedies to meet novel legal situations. It is true that the natural justice should not degenerate into a set of hard and fast rules. There should be a circumstantial

flexibility. The Apex Court in the case of ***Charan Lal Sahu* v. *Union of India***, AIR 1990 SC 1480 held that non-compliance with the principles of natural justice should not result in mechanical invalidation. While appreciating the breach of the procedural follow up, it is necessary to see whether any prejudice has been caused to the charged officer. Keeping the settled principles of law which the judicial authority is expected to adopt, we propose to examine the issue at hand.

16. On the above backdrop, fairness required that each adverse circumstance prejudicial to the interest of the petitioner ought to have been put to him simply and separately. The requirement of sub-rule 20 has been completely disregarded by the Enquiry Officer. The prejudice caused is extensively demonstrated by the learned counsel before us.

17. Considered from this angle, learned counsel appearing for the delinquent officer/ petitioner has not only successfully demonstrated before us that the petitioner was entitled to have his right to call for the material which was prejudicial to his case but he went a step ahead and successfully demonstrated as to how infraction of sub-rule 20 (supra) has caused substantial prejudice to the petitioner. In the light of the view we are inclined to adopt, it is not necessary to set out the substantial prejudice suffered by the petitioner due to non-

compliance of the natural justice flowing from sub-rule 20 (supra); which has direct effect on the legality and validity of the departmental enquiry as such.

18. At one stage we thought of remitting the matter back to have fresh inquiry from the stage the illegality has crept in. But having realised the long span of time ranging for almost more than 20 years, we though it better to give second thought in the light of the suggestion given by the learned counsel appearing for the petitioner, who has filed on record an undertaking duly affirmed by the petitioner not to claim any financial benefits for the past period i.e. For the period prior to the decision of this petition. In his submission, whatever relief the Court feels reasonable should be granted prospectively so as to avoid future hardship to the petitioner and any prejudice to the respondent- State.

19. Having said so, we may also place it on record that the learned counsel for the petitioner also demonstrated successfully that the punishment inflicted is disproportionate to the misconduct which the petitioner alleged to have committed. In order to consider this aspect of the matter, it is necessary to turn to the provisions of MCS (D & A) Rules which provides for punishment for minor and major misconducts. The relevant provisions of the said Rules read as under:

5. Penalties.

(1) Without prejudice to the provisions of any law for the time being in force, the following penalties may, for good and sufficient reasons and as hereinafter, provided, be imposed on a Government servant, namely -

Minor Penalties.

(i) ... ...

(ii) ... ...

(iii) Recovery from his pay of the whole or part of any pecuniary loss caused by him to Government, by negligence or breach of orders;

(iv) ... ...

(v) ... ...

Major Penalties.

....

(Emphasis supplied)

20. Rule 27 of the Maharashtra Civil Services (Pension) Rules, 1982 (“MCS Pension Rules” for short) gives right to the Government to withhold or withdraw pension. Sub-rule (1) thereof reads as under:

(1) Government may, be order in writing, withhold or withdraw a pension of any part of it whether permanently or for a specified period, and also order the recovery, from such pension, the whole or part of any pecuniary loss caused to

> Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement.
>
> Provided that the Maharashtra Public Service Commission shall be consulted before any final orders are passed in respect of officers holding posts within their purview.
>
> Provided further that where a part of pension is withheld or withdrawn, the amount of remaining pension shall not be reduced below the minimum fixed by Government.

21. If one turns to the nature of punishment to be inflicted, it is necessary to observe that, had the petitioner been in employment at the time of inflicting punishment, the petitioner could have been at the most liable for minor punishment enumerated in Rule 5(iii) of MCS (D & A) Rules (supra) since the major charges which are proved against the petitioner are that of causing financial loss to the State by his negligence. The petitioner has successfully demonstrated before us the circumstances in which the alleged act of omission or commission leading to alleged financial loss to the State due to his negligence has taken place. Merely because the petitioner was a retired person, punishment flowing from rule 27 of the MCS Pension Rules was inflicted on him which empowers the competent authority to

withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part. In our considered view, the competent authority ought to have diluted the punishment while taking decision considering the fact that it was a case for inflicting minor penalty had the petitioner been in employment.

22. The employee's right to pension being statutory right, the measure of deprivation must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right of assistance at the evening of his life as assured under Article 41 of the Constitution of India. The impugned order discloses that the competent authority withheld on permanent basis the payment of 50% pension. In addition to this, petitioner is also deprived of his right to gratuity to the extent of 50%.

23. The learned counsel for the Petitioner has submitted that the Petitioner has put in more than 22 years of service in the Department of Medical Education and Drugs and he has been superannuated in the year 1990. Almost for a period of 18 years, he has been deprived of his right to have pension to the extent of 50%. His total pensionable pay is Rs.3,010/-. Out of this amount, after deducting 50% of the amount, his pensionable pay comes to Rs. 1,505/-. Learned

counsel for the petitioner submits that for past 18 years, Petitioner has lost monetary benefit of about Rs. 3,24,000/- + loss of 50% Gratuity. The submission advanced is that as against the alleged loss of Rs. 1,22,835.86, the State has recovered from the Petitioner more than the alleged loss suffered, as such the punishment is grossly disproportionate to the alleged misconduct committed by the Petitioner which needs to be set aside, may be with prospective effect in view of the undertaking given by the Petitioner.

24. During the course of arguments, the learned counsel of the Petitioner has filed an undertaking stating that he would not claim any arrears of pension, retirement benefits and/or other financial benefits including arrears of 50% gratuity other than what is already paid to him by the Respondents for the period upto 1-10-1999 when he was superannuated from the services.

25. The Learned AGP has opposed above submission and objected to the undertaking. He also circulated his written submissions. He urged that the guidelines are set out by the Hon'ble Supreme Court in the case of ***Om Kumar and others*** v. ***Union of India*** in Special Leave Petition (Civil) No.21000/1993 while considering the question of quantum of punishment; wherein it is ruled that interference by the court is possible only when "Wednesbury principles of

reasonableness" are violated in the sense that the action of the administrative authority is such that a reasonable authority would not have reached to the conclusion drawn on the basis of proved facts and, therefore, interference is called for and that the penalty should be so shockingly arbitrary or unreasonable or disproportionate that the court needs to be intervened.

26. The Hon'ble Supreme Court in SLP No. 21000 of 1993 (***Om Kumar and others*** **v.** ***Union of India***) has observed that the Court while reviewing punishment, if satisfied that Wednesbury principles are violated, it should, normally, remit the matter to the administrator for a fresh decision as to the quantum of punishment – Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and in such extreme or rare cases, the Court can substitute its own view as to the quantum of punishment.

27. On the above canvass, the question which needs to be addressed is: whether the case in hand can be called covered under Wednesbury principles.

28. In the present case, the financial loss caused to the Government needs to be considered. In all, total loss caused to the Government is Rs. 1,22,836/-. Past 18 years, petitioner has

been deprived of his pension to the extent of 50% i.e. @ Rs.1,505/- per month. Till now, the government has recovered Rs.3,24,000/- from the pension of the petitioner together with 50% of gratuity amount as against the alleged loss of Rs.1,22,836/-. The Government has recovered more than 3 times of the alleged loss suffered by it. It is also to be considered that no financial gain was received by the Petitioner due to his negligence leading to alleged loss to the Government.

29. The petitioner is 77 years old. Considering the nature of the alleged charges assuming it to be proved and the recovery of the huge amount in the past 18 years, the rigour of the penalty needs to be mellowed down. We have considered the Wednesbury principle and so also we could lay our hand on the ruling of the Hon'ble Supreme Court in ***Bhagat Ram*** v. ***State of Himachal Pradesh*** reported in AIR 1983 SC 454. In this case, the Supreme Court held that,

> "it is equally true that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution."”

The Apex Court in the case of ***Coimbatore District Central Co-operative Bank*** **v.** ***Coimbatore District Central Co-operative Bank Employees Association and another*** reported in (2007) 4 SCC 669 ruled

that while determining the question of reasonableness and fairness on the part of the statutory authority the question must be considered having regard to the factual matrix in each case. It cannot be put in a straitjacket formula and must be considered keeping in view the doctrine of flexibility.

30. In the case of ***State of M.P. & Others*** **v.** ***Hazarilal*** **(2008) 3 SCC 273**, the Apex Court held that the legal parameters of judicial review have undergone sea change. Wednesbury principle of unreasonableness has been replaced by doctrine of proportionality. The observations made in a case where penalty imposed on a government servant was found to be disproportionate to the conduct which led to his conviction the Doctrine of proportionality was applied by the Court. The relevance of these principles cannot be ignored while considering the case in hand.

31. As already stated, at one point of time we thought of remitting this matter for putting adverse circumstances to the petitioner under sub-rule 20 (supra) and to reconsider the question of punishment. However, on deeper consideration, we came to the conclusion that it would be futile exercise considering the factual matrix available on record which, unequivocally, suggests that the petitioner has crossed age of 77 years. He retired from service somewhere in the year 1990. Almost 18 years have passed. The petitioner has already compensated the State

Government more than the financial loss suffered by it. The petitioner has suffered a huge financial loss, economic and mental agony due to the charge of the alleged misconduct, which can hardly be said to be a major misconduct assuming it to be proved against the petitioner. The long period of time and the advance age of the petitioner prevents us from remitting this matter back and, in the interest of justice, looking to the peculiar facts and circumstances of the case, compels us to consider the question of punishment on the basis of material available on record.

32. For the reasons recorded herinabove, in our considered view the departmental enquiry itself is exposed to vice of nullity in view of infraction of sub-rule 20. Alternatively, even assuming that the enquiry proceedings are legal and valid, even then the punishment inflicted is disproportionate to the alleged misconduct alleged to have been proved against the petitioner which is liable to be interfered with.

33. The petitioner since has given an undertaking not to claim past monetary benefits and the fact that the loss suffered by the State already stands recovered from the petitioner, who has also suffered heavy financial loss on account of non-payment of 50% amount of gratuity and pension almost for a period of 18 years, we are of the considered view that ends of justice would be met by accepting the undertaking given by the petitioner and setting aside the punishment and,

to that extent, the order of the MAT affirming action of the respondents. It is declared that the petitioner would not be entitled to claim arrears of any monetary benefits for the period prior to the pronouncement of this judgment and further declare that petitioner shall be entitled to full pension with effect from 1st April, 2009.

34. In the result, petition is partly allowed. Rule is made absolute in terms of this order with no order as to costs.

(MRIDULA BHATKAR,J.) **(V.C.DAGA,J.)**