

(2002) 05 BOM CK 0016
In the Bombay High Court
Case No : Writ Petition No. 2534 of 2000

Anil Amrut Atre

APPELLANT

Vs

District and Sessions Judge, Aurangabad

RESPONDENT

Date of Decision : 02-05-2002

Acts Referred:

Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 — Rule 23(2), 5

Citation : (2003) 2 BomCR 246 : (2002) 3 BOMLR 406 : (2002) 3 LLJ 956 : (2002) 3 MhLj 750

Hon'ble Judges : C.K. Thakker, C.J.;N.H. Patil, J;B.H. Marlapalle, J

Bench : Full Bench

Advocate : S.R. Barlinge, for the Appellant; E.P. Sawant, Government Pleader, for the Respondent

Final Decision : Partly Allowed

Judgement

C.K. Thakker, C.J.—This Petition has been referred to a Full Bench, in view of a decision of the Division Bench of this Court in Anant Sadashiv Chandwandkar Vs. District Judge and Disciplinary Authority, District Court, Thane and Others, as it was contented by the learned counsel for the petitioner that Anant Sadashiv Chandwandkar does not lay down correct law, and the decision of the Supreme Court in Ram Chander Vs. Union of India (UOI) and Others, has not been properly understood and correctly applied by the Division Bench.

2. Before we advert to the question raised in the Petition, few relevant facts may be stated :--

On August 10, 1990, the petitioner was appointed as Peon by the District and Sessions Judge, Aurangabad, respondent No. 1 herein, after following due process of selection. It was the case of the petitioner that he was duly elected as the President of Class-TV Employees Association in the District Court. As the President of the Association, he was required to place grievances of members of the Union before the first respondent to take steps for bringing awareness in

respect of working conditions of the employees in the department. As averred by the petitioner, it caused inconvenience to respondent No. 1, who, in connivance with other judicial officers, attempted to pressurize the petitioner asking him to tender apologies from time to time. It is also his case that certain judicial officers developed grudge against him, and even false complaints were filed by them. An enquiry was instituted, and one V.V. Shahapurkar, Vth Joint Civil Judge, Senior Division, Aurangabad, was appointed as Enquiry Officer. A charge-sheet was served upon the petitioner on November 29, 1996 making several allegations therein. The petitioner filed his reply on December 7, 1996, and also submitted a list of witnesses whom he wanted to examine in his defence. It is the say of the petitioner that the Department examined witnesses in support of the allegations levelled against the petitioner, but the petitioner was not permitted to examine witnesses in his defence which had caused material prejudice to him. On March 14, 1997, the Enquiry Officer submitted his report to the Disciplinary Authority - respondent No. 1. Respondent No. 1 issued a show cause notice along with a copy of the enquiry report and by asking the petitioner if he wanted to say anything in the matter. The petitioner filed his reply controverting the findings recorded by the Enquiry Officer, as also making complaint against not allowing him to examine witnesses in his defence. Finally, on August 6, 1998, the in-charge District and Sessions judge, Aurangabad, held the charges levelled against the petitioner proved and imposed penalty of removal from service upon the petitioner.

3. The petitioner preferred an appeal before the High Court, and the Registrar of the High Court, respondent No. 2 herein, communicated to the petitioner vide a communication dated June 25, 1999 that the High Court does not see any reason to interfere with the findings recorded by the Disciplinary Authority and accordingly, the Appeal was dismissed.

4. The present petition is filed against the above orders, passed by the Disciplinary Authority, respondent No. 2, and confirmed by the administrative side of the High Court.

5. When the matter came up before a Division Bench it was argued that Anant Sadashiv Chandwandkar did not lay down correct law and the ratio in Ram Chander had not been properly applied. Since Anant Sadashiv Chandwandkar was decided by a Division Bench wherein Ram Chander was specifically referred to, relied upon and followed, the Division Bench thought it fit to place the matter before a larger Bench, and, accordingly, the matter has been placed before us.

6. We have heard the learned counsel for the parties.

7. The learned counsel for the petitioner raised the following contentions:

(1) The order passed by the Disciplinary Authority and confirmed by the Appellate Authority is illegal, unlawful and improper, inasmuch as no reasonable opportunity had been afforded to the petitioner and he was not allowed to examine witnesses in his defence. Since the first order passed by the Disciplinary

Authority was in violation of principles of natural justice and fair play, it was liable to be quashed and set aside. Consequential order passed by the administrative side of the High Court in appeal deserves to be set aside.

(2) Anant Sadashiv Chandwandkar does not lay down correct law. Though the decision of the Supreme Court in Ram Chander was referred to, relied upon and distinguished, the ratio laid down by the Apex Court had been misunderstood. Almost in similar circumstances, an order was held to be bad by the Supreme Court. The decision of the Division Bench in Anant Sadashiv Chandwandkar, hence, requires to be over-ruled,

(3) Before disposal of the Appeal, filed by the petitioner against an order passed by the Disciplinary Authority, the administrative side of the High Court has not provided an opportunity of hearing to the petitioner, nor personal hearing was accorded, nor reasons were recorded and on those grounds also, the order suffers from legal infirmity. In such cases, it was incumbent on the High Court to give personal hearing, to record reasons and to forward a copy of the final order passed by the administrative side of the High Court to the delinquent. In the instant case, even a copy of the order passed by the High Court was never sent to the petitioner. What was sent to him was only a communication by the Registrar that the Appeal filed by the appellant was dismissed by the High Court.

(4) Even if it is assumed that the petitioner has committed misconduct alleged against him, considering the totality of facts and circumstances, quantum of penalty of removal from service of the petitioner was highly excessive, disproportionate and shocking to the charges and, therefore, requires to be reduced.

8. The learned counsel for the respondents, on the other hand, submitted that the order does not deserve interference. After considering the material on record, certain findings were recorded by the Enquiry Officer. A copy of the report of the Enquiry Officer was forwarded by the Disciplinary Authority to the petitioner. He was called upon to say whatever he wanted to say in the light of the findings recorded by the Enquiry Officer and, after affording full opportunity, an order of penalty was passed against him. It was specifically observed by the Enquiry Officer that though the petitioner had mentioned certain names of the Court officials with whom he had performed duties, and had requested to call upon them and enquire about the behaviour of the petitioner, he never submitted a list of witnesses whom he wanted to examine, along with the reply. In the circumstances, it cannot be said that opportunity of hearing was not afforded to him. It was also submitted that in many cases, this Court held that it is not necessary to give personal hearing to the delinquent, nor to record reasons. The impugned action taken against the petitioner, hence, cannot be termed as illegal or unlawful. It was urged that in Anant Sadashiv Chandwandkar, the Division Bench distinguished the judgment of the Supreme Court in Ram Chander, and the petitioner cannot make grievance. On quantum of punishment, it was submitted that several charges were levelled against the petitioner, and they

were established. Even in past, the conduct and behaviour of the petitioner was objectionable. If, after taking into account totality of facts and circumstances, an action was taken by the Disciplinary Authority, and had not been interfered with by the Appellate Authority, it cannot be said that no such punishment could have been imposed. Ultimately, this Court is exercising power of judicial review and it would not substitute its opinion for the opinion of the Disciplinary Authority or Appellate Authority. It was, therefore, submitted that there is no substance in the petition, and it may be dismissed.

9. Having heard the learned counsel for the parties, in our opinion, the petition deserves to be partly allowed. So far as the contention of not permitting the petitioner to examine witnesses in his defence is concerned, we find no substance in the said contention. In paragraphs 3 and 4 of the petition, it is, no doubt, contended by the petitioner that after receipt of the charge-sheet, he submitted his reply, as also a list of witnesses, whom he wanted to examine in his defence. The said reply is annexed to the petition, as Annexure "C" but, as rightly stated in the affidavit-in-reply on behalf of the respondents, the petitioner had never submitted a list of witnesses whom he wanted to examine in his defence. It is further clear from the fact that the Enquiry Officer put many questions to him. Question No. 44 was as to whether the delinquent wanted to examine himself, to which he answered in the negative. Similarly, question No. 45 was whether the petitioner wanted to examine any other witness to which also, he replied that he did not feel it necessary to examine any witness.

10. In view of the above clear and categorical replies, in our opinion, submission of the learned counsel for the respondents must be upheld that reasonable opportunity of hearing was afforded by the Enquiry Officer, and it cannot be said that even though the petitioner wanted to examine witnesses in his defence, the said opportunity was not extended by the Enquiry Officer, and the rules of natural justice were violated. The contention has no force, and must be rejected.

11. But so far as the decision in appeal is concerned, the objection raised by the learned counsel for the petitioner is well-founded, and must be upheld. In this connection, it may be necessary to refer to the provisions of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 (hereinafter referred to as "the Rules"). Rule 5 provides for penalties, Rule 8 lays down procedure for imposing major penalties, Rule 9 enables an action to be taken on enquiry report, Rule 17 enumerates orders against which an appeal lies. It is not in dispute that an appeal lies against an order of removal, and, hence, appeal filed by the petitioner against the order of removal was maintainable. The Maharashtra Rules have been adopted by the High Court.

12. Rule 23 is relevant for the purpose of controversy raised in the petition. The material and relevant part may, therefore, be quoted :--

"23. Consideration of appeal. -

(1).....

(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 5 of these rules or enhancing any penalty imposed under that rule, the Appellate Authority shall consider -

(a) whether the procedure laid down in these rules has been followed, and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;

(b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe, and pass orders -

(i) confirming, enhancing, reducing, or setting aside the penalty; or

(ii) remitting the case to the authority which had passed the order appealed against, with such directions as it may deem fit in the circumstances of the case:

Provided that

(i)

(ii)

(iii)

(iv)

(3)"

Whereas Rule 25 provides for revision, Rule 25-A for review.

13. The question, therefore, is whether the Appellate Authority had followed the mandate of Sub-rule (2) of Rule 23 of the Rules.

14. In this connection, our attention has been invited by the learned counsel for the parties to relevant decisions on the point.

15. In *R. P. Bhatt v. Union of India and Ors.*, (1986) 2 SCC 657 the Apex Court was called upon to consider the provisions of Rule 27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, the relevant Rule read as under :--

"27(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said Rules, the Appellate Authority shall consider:

(a) whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice.

(b) whether the findings of the disciplinary authority are warranted by the

evidence on the record; and

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe;

and pass orders -

(i) confirming, enhancing, reducing, or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case."

16. Interpreting Sub-rule (2) of Rule 27 and emphasizing the word "consider" as implying due application of mind, the Court observed :--

"The word "consider" in Rule 27(2) implies due application of mind, it is clear upon the terms of Rule 27(2) that the Appellate Authority is required to consider (1) whether the procedure laid down in the Rules has been complied with, and if not, whether such non-compliance has resulted in violation of any provisions of the constitution or in failure of justice, (2) whether the findings of the disciplinary authority are warranted by the evidence on record, and (3) whether the penalty imposed is adequate, and thereafter pass orders confirming, enhancing etc. the penalty or may remit the case to the authority which imposed the same. Rule 27(2) casts a duty on the appellate authority to consider the relevant factors set forth in clauses (a), (b) and (c) thereof."

17. In that case, the Appeal was dismissed, without considering the relevant facts and circumstances. It was, therefore, held that the appellate order was liable to be quashed and set aside, as there was non-application of mind on the part of the Appellate Authority to the relevant circumstances mentioned in Rule 27(2) of the Rules. The Court noted that there was no indication in the impugned order as to how the Appellate Authority was satisfied as to whether the procedure laid down in the Rules had been complied with and if not, whether such non-compliance had resulted in violation of any provisions of the Constitution or failure of justice. The Appellate Authority had not given any finding on the crucial question whether the finding of the Disciplinary Authority was warranted by evidence on record. Since there was non-compliance with the requirements of the Rules, the order was vulnerable.

18. In Ram Chander Vs. Union of India (UOI) and Others, , again, a similar question came up for consideration before the Supreme Court. It was a matter under the Railway Servants (Discipline and Appeal) Rules, 1968. An Appeal was provided against punishment under Rule 22(2) of the Rules which stated :

"22(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 6 or enhancing any penalty imposed under the said rule, the Appellate Authority shall consider -

(a) whether the procedure laid down in these rules has been complied with, and

if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;

(b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe;

and pass orders -

(i) confirming, enhancing, reducing or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such directions as it may deem fit in the circumstances of the case."

Referring to and relying upon R.P. Bhatt, the Court held that the order passed by the Railway Board-Appellate Authority was just a mechanical reproduction of the phraseology of Rule 22(2), inasmuch as there was neither any attempt to marshal the evidence on record with a view to decide whether the findings arrived at by the Disciplinary Authority could be sustained or not, nor there was any indication of application of mind as to the act of misconduct with which the appellant was charged and his past record. Dismissal or removal from service was a matter of grave concern and such an action could not have been taken without complying with the requirement of law.

19. The Court stated :--

"These authorities proceed upon the principle that in the absence of a requirement in the statute or the rules, there is no duty cast on an appellate authority to give reasons where the order is one of affirmance. Here, Rule 22(2) of the Railway Servants Rules in express terms requires the Railway Board to record its findings on the three aspect stated therein. Similar are the requirements under Rule 27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, Rule 22(2) provides that in the case of an appeal against an order imposing any of the penalties specified in Rule 6 or enhancing any penalty imposed under the said rule, the appellate authority shall consider as to the matters indicated therein. The word consider has different shades of meaning and must in Rule 22(2), in the context in which it appears, mean an objective consideration by the Railway Board after due application of mind which implies the giving of reasons for its decision."

The order of the Appellate Authority, as also the judgment of the High Court, were set aside and direction was issued to the Railway Board to hear and dispose of the appeal afresh after affording personal hearing to the appellant on merits and by passing a reasoned order in conformity with the Rules.

20. In Anant Sadashiv Chandwandkar the Division Bench of this Court not only referred to Ram Chander, but even exhaustively quoted observations therefrom.

The said decision, however, was distinguished by stating that the ratio laid down in Ram Chander would not be attracted in interpreting and applying the Rule in question.

21. The Division Bench stated :--

"In this context it is pertinent to note that the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 nowhere provides for a hearing to be given in an appeal and does not provide for points to be considered in an appeal against decision in domestic enquiries. Rules 20 to 23 of the aforesaid Rules, more particularly Rules 20(2) and 23 which deal with appeals in findings against domestic enquiry does not contemplate giving of a personal hearing and does not contemplate the consideration of points in an appeal. Hence, in the absence of Rules in that behalf, it is not necessary to give a hearing and to pass a reasoned order in a domestic enquiry."

22. From the above observations, it is clear that according to the Division Bench, the Maharashtra Rules nowhere provides for hearing to be given in an appeal. Likewise, they do not provide for points to be considered in an appeal. They do not enjoin recording of reasons or communication of orders in appeal to the appellant. In the absence of specific and express provisions, it was not necessary to give personal hearing to the appellant or to pass a reasoned order, concluded the Division Bench.

23. With respect, we are unable to agree with the above observations of Division Bench. Apart from the fact that the decision of the Supreme Court in R.P. Bhatt has not been understood and applied in its correct perspective, the Division Bench was not right in observing that the Maharashtra Rules did not provide for consideration. We have already extracted the relevant part of Rule 23 of the Rules as also the relevant Rules of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, which came to be considered in R.P. Bhatt as also the Railway Servants (Discipline and Appeal) Rules, 1968 which came up for consideration in Ram Chander. The Maharashtra Rule is almost similar to both the Rules. In all the three Rules, the expression "consider" is used. It was, therefore, obligatory on the part of the Appellate Authority to consider the relevant facts and circumstances. Again, Clause (a) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, as well as the Railway Servants (Discipline and Appeal) Rules, 1968 enjoined the Appellate Authority to consider whether the procedure laid down in the Rules "has been complied with". The Maharashtra Rules mandates the Appellate Authority to consider whether the provision of the Rule "has been followed". Thus, the change in the phraseology is of no consequence whatsoever. (In Central Rules, the phrase used is "has been complied with", whereas in the Maharashtra Rules, it is "has been followed".)

24. In our opinion, the mandate of law and direction of the Supreme Court would be applicable with equal force to Maharashtra Rules also. It was, therefore, the duty of the Appellate Authority to consider whether the procedure laid down in

the Rules "has been followed", i.e. "has been complied with".

25. The Division Bench was therefore, in our considered opinion, not right in distinguishing Ram Chander and observing, albeit incorrectly, that the Maharashtra Rules did not provide for consideration against decision rendered by the Disciplinary Authority under the Rules. R.P. Bhatt and Ram Chander both have interpreted a similar Rule, and it was held that it was the duty and obligation of the Appellate Authority to consider whether the procedure laid down in the Rules had been complied with and if not, what was the effect of non-compliance thereof, whether the findings recorded by the Disciplinary Authority were warranted by the evidence on record and whether the penalty imposed was adequate. Since nothing was done by the Appellate Authority, the order is clearly illegal and unlawful and deserves to be interfered with.

26. Interpreting almost a similar provision in Central Rules, in both the decisions, the Supreme Court held that a personal hearing ought to be afforded to the delinquent in such cases, and a reasoned order must be passed by the Appellate Authority. In the instant case, it is not even the case of respondent No. 2 that personal hearing was afforded to the petitioner by the Appellate Authority. No reasons have been recorded. Even a copy of the order has not been forwarded to the petitioner, and what was conveyed was a letter addressed by the first respondent on June 25, 1999 intimating the petitioner that his appeal was dismissed by the Appellate Authority.

27. At the time of hearing, our attention was invited by learned Government Pleader to an order passed by the Appellate Authority dated June 17, 1999. The said order reads as under :--

"This is administrative appeal preferred by Shri Anil A. Atre, Ex-Peon, District Court, Aurangabad, against the order dated 6-8-1998 passed by I/c. District Judge, Aurangabad in the Departmental Enquiry No. 2/96 by which he was removed from service.

I have gone through the grounds of administrative appeal, record of departmental enquiry and other relevant material. It is found that witnesses Shri Ashok Ramvilas Vyas, Shri Abdul Nazir Khatrubhai Pathan and other witnesses supported, the charge against the appellant. The Enquiry Officer has properly considered the evidence on record. Sufficient opportunities were given to the appellant.

In this background, the order of removal from service passed by the I/c. District and Sessions Judge, Aurangabad is wholly justified and I do not find any reason to interfere with the order of I/c. District Judge, Aurangabad.

The Appeal, therefore, stands dismissed."

28. Almost a similar order was passed by the Appellate Authority in R.P. Bhatt. The Director General, in that case, dismissed the appeal, observing :

"After thorough examination of the facts brought out in the appeal, the DGBR (Director General, Border Roads Organisation) is of the opinion that the punishment imposed by the CE (P) [Chief Engineer (Project)] Dantak vide his order No. 10527/762/EIB dated June 24, 1978 was just and in accordance to the rules applicable. He has accordingly rejected the appeal."

29. In the opinion of the Supreme Court, there was non-application of mind by the Appellate Authority. The order was, therefore, set aside and direction was issued to the authority to dispose of the appeal afresh after application of mind to the relevant Rules. Even on that ground, therefore, the present Petition deserves to be allowed.

30. The learned Government Pleader invited our attention to a decision of the Division Bench of this court in Writ Petition No. 2480 of 1999, B. C. Patel v. The Prothonotary and Senior Master, High Court (O.S.) and Ors. with Writ Petition No. 2086 of 1999, J. A. Naiksatam v. The Hon'ble Chief Justice, High Court, and Ors. decided on December 22, 1999, wherein it was held that it was not necessary to give oral hearing to the employee.

31. In our opinion, however, the point is finally concluded by the Supreme Court in above two decisions, wherein interpreting similar Rules, the Apex Court has held that personal hearing ought to be afforded by the Appellate Authority to the delinquent. We are, therefore, unable to agree with the conclusions in the above cases. Similarly, in Writ Petition No. 3221 of 1996 Subhash Tatoba Nikam v. The Hon'ble High Court of Judicature of Bombay and Anr. decided on December 3, 1998, it was held that when the Appellate Authority affirms the original order, no reasons were required to be recorded. With respect, the decision is not in conformity with the decisions of the Supreme Court R. P. Bhatt and Ram Chander, and cannot be said to have laid down correct law on the point, State Bank of Patiala v. Mahendra Kumar Singhal, 1994 Suppl. (2) SCC 463 is not relevant to the point. It was held by the Apex Court therein that affording of personal hearing by the Appellate Authority is not necessary in absence of such a rule. In the instant case, the Appellate Authority is required to consider as to whether the procedure laid down in the Rules has been followed, and, according to the Supreme Court, the expression ("consider") will include within its sweep application of mind, personal hearing and recording of reasons. It was, therefore, obligatory on the Appellate Authority to apply its mind and to pass an appropriate speaking order after affording personal hearing to the delinquent.

32. Finally, it was submitted by the learned counsel for the respondents that in the instant case, the action taken against the petitioner is proper, reasonable and called for in the circumstances. It was submitted that the petitioner was serving in judiciary, and looking to his conduct and behaviour at the enquiry on hand as well as in past, the Disciplinary Authority rightly observed that such a person is not befitting to remain in Judicial Department. The Appellate Authority was, therefore, right in dismissing the appeal and upholding his removal.

33. Since we are of the opinion that the order passed by the Appellate Authority is not in accordance with law and liable to be set aside, we express no opinion on quantum of punishment. As and when the Appellate Authority will take up the matter for consideration, it is open to the first respondent to content that in the facts and circumstances, punishment imposed on the petitioner could not be termed as illegal, arbitrary or otherwise unreasonable.

34. As and when the question will be considered by the Appellate Authority, it will take into account the findings recorded by the Enquiry Officer, as accepted by the Disciplinary Authority, as also the earlier conduct and behaviour of the petitioner and will make an appropriate order.

35. For the foregoing reasons, the petition deserves to be partly allowed, and is, accordingly, allowed by quashing and setting aside the order passed by the Appellate Authority and by directing it to re-consider the matter and to dispose of the Appeal by affording personal hearing to the petitioner and by passing an appropriate speaking order. Order accordingly. In the facts and circumstances, there shall be no order as to costs.